ENQUIRY REPORT

(Under Section 37(2) of the Competition Act, 2010)

IN THE MATTER OF ALLEGED VIOLATION OF COMPETITION ACT, 2010 BY PESHAWAR ELECTRIC SUPPLY COMPANY

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Dated: March 17, 2022

BACKGROUND AND FACTS

1. On December 01, 2020, The Competition Commission of Pakistan (the 'Commission') received two formal complaints (Annexure-i) from both Cyber Internet Services (Private) Limited and Nayatel Private Limited (herein after collectively called as 'Complainants') under Section 37(2) of the Competition Act 2010, to initiate proceedings and pass appropriate orders, against Peshawar Electric Supply Company (herein after called ' Respondent') for an alleged increase in rent for the right of way (hereinafter 'ROW') service through its electric poles, and imposing discriminatory conditions in prima facie violation of Sections 3(3)(b), 3(3)(d), 3(3)(e), 3(3)(h), 4(2)(a), 4(2)(f), 4(2)(g) of the Competition Act, 2010 (hereinafter 'the Act').

2. In their plaint, the complainants referred to a new renting policy (Annexure-ii) duly approved in the 145th meeting of the board of directors of Respondent held on July 07, 2020, whereby the rental charge was increased to Rs. 100/pole/month and some ancillary conditions were also imposed. The complainants explained that by virtue of Water & Power Development Authority's (WAPDA) letter of 2004 (Annexure-iii), implementing the decision of Inter Provincial Coordination Committee of the Federal Cabinet, the Respondent made its poles available to cable operators @ Rs 10/pole per month. At that time broadband service was primarily provided through cables/means separate from fiber optic. However, the Respondent increased this rate to Rs. 100/pole/month only for aerial optical fiber cable operators (hereinafter AOFC service providers) through aforementioned renting policy.

3. The Complainants alleged that this new renting policy along with other conditions is tantamount to discriminatory conditions in violation of Sections 3 and 4 of the Act. The Complainants claimed that the relevant product market is ROW for aerial cables across electricity poles without any distinction between which type of cable is being passed.

4. The complainants alleged that the Respondent has in fact imposed dissimilar conditions on similar transactions for utilizing Respondents ROW services. The Table-1 below lists the alleged dissimilar conditions:

Table 1

Conditions for Complainants	Cable operators (General Cable TV Operators)
Rent of Rs 100/month/pole	Rent of Rs 10/month/pole
Requirement to execute fresh agreement	Not Applicable
Retrospective application of Rs 100 since expiry of the preceding agreement	Not Applicable
2 years contract period, where after Respondent can refuse to extend	Unlimited Term
Security deposit and processing fee, etc required	Not Applicable
10 minutes free advertising for PESCO	Not Applicable
Free internet facility to PESCO with 4mbps minimum bandwidth	Not Applicable
Cable specs being determined by PESCO	Not Applicable
Completion Certificate requirement	Not Applicable
Respondent's unilateral termination right-arbitration is limited only to grant of damages for wrongful termination and not on the question of termination itself	Not Applicable

5. To ascertain that the complaints are not frivolous or vexatious or based on insufficient facts, or without prima facie evidence, an initial assessment was carried out and the following facts were gathered:
   a. On 24.7.2020, the Respondent promulgated its new "Renting Policy for Aerial Optical Fiber Cable (AOFC) through usage of PESCO Electric Poles". Subsequently, on 21.10.2020, it was circulated that this policy would not apply to General Cable Operators (hereinafter 'cable operators').
   b. Prior to formulation of the impugned renting policy, the complainants paid rent as per WAPDA letter notified rate i.e. Rs 10. The same rent was also paid by the cable operators. Now, after the new policy, the complainants are obligated to pay Rs 100 per pole per month. Apart from this, the Respondent imposed several other supplementary conditions

such as, ***provision of 10 minutes free advertising for Respondent***, f***ree internet facility to Respondent with 4mbps minimum bandwidth, cable specs being determined by Respondent*** on the complainants, whereas no such conditions were imposed on cable operators.

6. Further, para wise comments of the Respondent were sought through a letter dated December 14, 2020. In its reply (Annexure-iv), the Respondent, acknowledging the charging of different rates, attributed it to the difference in the business models and the types of cable used by the Complainants and cable operators, claiming that the WAPDA notification of charging Rs 10/pole/month was only applicable on the latter.

7. Subject to evaluation of whether passing of cables by the cable operators and Complainants amounts to a similar service, and whether, the cable operators and the complainants operate in the same market, the charging of different pole rent and application of discriminatory supplementary obligations may amount to violations of Section 3(3)(b), 3(3)(d), 3(3)(e) and the relevant provisions of Section 4 of the Competition Act, 2010.Therefore, the complaints do not appear to be frivolous or vexatious and entail sufficient facts and prima facie evidences for initiation of enquiry under Section 37(2) of the Act.

8. Pursuant to the above mentioned formal complaint, an enquiry was initiated under Section 37(2) on January 11, 2021 to assess the allegations leveled therein and the following officers were appointed to constitute an enquiry Committee:
    a. Mr. Muhammad Shamaoun, Director (C&TA)
    b. Mr. Muhammad Qasim Khan, Joint Director (C&TA)
    c. Mr. Furqan Khan Khattak, Management Executive (C&TA)

9. During the course of enquiry, the enquiry committee sought information in writing, held meetings with the Respondent, Complainants and other stakeholders and also conducted inspection of different sites where cables are strung on the electric poles owned by PESCO in order to ascertain among other things the justification given by the Respondent for charging different rates to different categories of cable service providers for using its poles (onsite inspection report is attached as Annexure-v) . (The correspondences exchanged during enquiry are appended as Annexure-vi).

10. Before delving into the basic issues and their concomitant analysis, the enquiry committee deems it apt to give a brief run through of the types of services under consideration in this enquiry.

11. We begin by describing the hi-tech fiber optic technology employed by the Complainants to serve a common market. This technology converts electrical signals carrying data to light and sends the light through transparent glass fibers about the diameter of a human hair. Fiber transmits data at speeds far exceeding current DSL or cable modem speeds, typically by tens or even hundreds of Mbps. The actual speed consumers experience will vary depending on a variety of factors, such as the proximity of consumer's computer to the fiber and how the service provider configures the service, including the amount of bandwidth used.

12. High speed data delivery has revolutionized the technology spectrum in the telecom world. Any device that can access the World Wide Web (laptops, smart phones, tablets etc.) can receive all the services available on a smart TV. This is a huge transformation from the days when only a few channels could be tuned in for viewership. For a certain segment of the society, it is a norm to purchase internet access, along with video services and/or voice. When bundled in two or three, these services are often referred to as double play or triple play services. The quality of these services depend on the speed of data delivery as applications such as Netflix, prime TV and popular online games require fast streaming.

13. PTCL, Nayatel, Cybernet (Storm Fiber), Wateen, Transworld, SatComm and WorldCall are examples of such service providers in some of the major cities of Pakistan. They make use of fiber optic cables (along with other internet based systems) to provide broadband centric services to its consumer individually or in some combination as mentioned above. The other service in question is the general cable TV (typically a coaxial cable) that carries analog signals and is connected directly to a TV. These cables have been traditionally used in Pakistan to only offer live broadcast services. It has limited features and quality compared with high speed broadband service providers, and is comparably much cheaper than the latter in terms of any initial setup costs or monthly charges.

14. Having given a brief overview of the types of data services under examination in this enquiry, we next proceed to evaluate whether, in light of the basic issues and concerns brought forth by the Complainants against the Respondent, a prima facie violation under any of the provisions of Sections 3 and/or 4 of the Act have taken place or not. For evaluation of a prohibited agreement(s) under Section 4 of the Act, the step wise approach adopted is as provided below;

    a) Identification of Undertakings;
    b) Relevant market;
    c) Identification of issues and evaluation of the same for prima facie violation(s) of Section 4 of the Act ('Prohibited Agreements').

15. In case of determination of an alleged abuse of dominant position under Section 3 of the Act, after carrying out the first 2 steps as above, the next step is to determine whether the undertaking being alleged of abuse, is dominant in the relevant market. Subject to satisfaction of this condition, the pertinent issues are identified and then analyzed for any prima facie abuse in terms of Section 3 of the Act. In summation, the sequence followed is as given below:

    a) Post steps 1&2, whether Dominance exists in the Relevant Market.
    b) Subject to finding of Dominance, Identification of issues and evaluation of the same for prima facie violation(s) of Section 3 of the Act ('Abuse of Dominance')

UNDERTAKING(S)

16. An 'Undertaking' is defined under Section 2(1)(q) of the Act as follows:

> *"any natural or legal person, governmental body including a regulatory authority, body corporate, partnership, association, trust or other entity in any way engaged, directly or indirectly, in production, supply, distribution of goods or provision or control of services and shall include an association of undertakings."*

17. It follows that any entity engaged in an economic or commercial activity is regarded as an undertaking for the purposes of the Act.

a. Peshawar Electric Supply Company Limited (Respondent) is in the business of providing electricity, and maintaining electricity distribution system that delivers electricity to households and businesses located in the Khyber Pakhtunkhwa province of Pakistan. The Respondent also provides a pathway to data cables through its poles and charges rent for this service. The Respondent is therefore an undertaking as defined in clause (q) of sub-Section (1) of Section 2 of the Act.

b. Cyber Internet Services Private Limited (Complainant-I) is engaged in, *inter alia*, the business of internet and data communication services in 20 cities within Pakistan, therefore qualifying as an undertaking as per clause (q) of sub-section (1) of Section 2 of the Act.

c. Nayatel Private Limited (Complainant-II) provides ultra-broadband Internet, and digital video services to business and home users. Nayatel is using the latest technology for its network while utilizing state of the art fiber optic cable, known as fiber to the home (the"FTTH") , to deliver superior quality ultra-high speed internet, top quality video/TV and /telephony communication to its customers and is an undertaking defined in clause (q) of sub-section (1) of Section 2 of the Act.

18. Each of the entities described above i.e. PESCO, CISPL, and NTL satisfy the definition of an 'undertaking' and are therefore subject to the provisions of the Act.

RELEVANT MARKET

19. For the purpose of defining a relevant market in this enquiry, we refer to the definition of relevant market as provided under Section 2(1) (k) of the Act.

> *"Relevant market" means the market which shall be determined by the Commission with reference to a product market and a geograp1hic market and a product market comprises of all those products or services which are regarded as interchangeable or substitutable by the consumers by reason of the products' characteristics, prices and intended uses. A geographic market comprises the area in which the undertakings concerned are involved in the supply of products or services and in which the conditions of competition are sufficiently homogenous and which can be distinguished*

from neighboring geographic areas because, in particular, the conditions of the Competition are appreciably different in those areas;

20. As defined above, a relevant market comprises a (i) product market and the (ii) geographic area where such product/service is supplied/sold. The two factors that determine the scope of a product's market are (i) demand side substitutability and (ii) supply side substitutability whereas for geographic market the limiting factor is the conditions of competition that vary from one area/region to another for the sale of the relevant product.

21. Application of demand side substitutability involves all those products and/or services which are regarded as interchangeable or substitutable (substitutability) by reason of product characteristics, prices and intended use, whereas the supply side substitutability assessment includes products and/or services that could readily be put on the market by other producers without significant switching cost or by potential competitors at reasonable cost and within a limited time.

22. In the matter at hand, PESCO's electric poles are rented to optic fiber cable and general cable service providers in Peshawar as a passage way for their cabling requirements. While the optic fiber could also be laid underground to transmit services, and it could be argued that the same is a substitute for electric poles, we may need to refer back to the definition of relevant market provided under Section 2(1)(k) of the Act, wherein only those products or services are considered to be substitutable, that have similar characteristics, intended usage and price as discerned by a consumer.

23. Factors that make it impractical to substitute poles with an underground passage are as discussed below:

FINANCIAL IMPACT

a) A cost comparison between pole rental for passing the cable and laying the same cable through underground means vis a vis electric poles (based on discussion with the Respondent during the onsite inspection) is as provided below:

Description	Charges	Yearly charges
Cost of Ariel Network	Per pole charges Rs. 10 Yearly charges Rs. 120	Rs. 120 = Rs. 10 X12
Cost of underground network*	Underground charges per meter per year Rs. 25	Rs.1250= Rs. 25 X 50* *50 meter is distance between two poles

* Rates of Peshawar Development Authority for yearly rates (Annexure-vii)

b) Not only are the yearly charges for the right to underground passage ten times that of aerial passage, but setting up one requires a heavy initial investment.

PRACTICAL ISSUES

c) Even when service providers are willing to invest in underground infrastructure, there are other impediments to its implementation. For instance no underground digging is possible unless approval is obtained from the relevant authorities. These approvals, at the very least, are difficult to obtain when not downright rejected. (Annexure- viii) . Furthermore in congested city areas, underground networks installation is very tedious if not impossible. To add to this, it is not always possible or practical to pass the whole length of the cable through the underground system, due to practical impediments, such as non-availability of underground corridors or existence of green belts on roads or streets.

d) Technically, customers are served from a single network which is a mix of underground and aerial. In a typical network, major and core routes are underground and last mile access to the customer is made aerial. With the exception of Islamabad where an underground passageway is readily available, for all other cities, Nayatel reaches its customers through a mix of aerial and underground passageway. For instance, Nayatel claims that in Rawalpindi, Faisalabad and Peshawar, the ratio of its land to aerial cabling is 20:80, 40:60 and 20:80 respectively. Thus it appears that the ROW issue for data cable operators is not an either or prospect between land and aerial route, but what is more feasible/practical based on ground realities.

24. In view of the foregoing, even though the intended usage of aerial and underground passage way is same, this is where all the commonality ends. Developing and utilizing the underground infrastructure requires more running expenditure in addition to sizeable initial investment. Not

just that, but more importantly there exist practical impediments such as need for approval of digging rights from the relevant authority which when not denied are hard to obtain. Congestion in various localities and lack of access to corridors/green belts on roads, streets etc are other possible impediments to laying of an underground infrastructure in a typically congested and unplanned city. In view thereof, an underground passage does not appear to be a substitute for an aerial pathway either in terms of costs or practical considerations, when talking about a typically congested and unplanned town such as Peshawar.

25. Other than the underground passage way, there are also PTCL owned poles, however as per Complainants they are customized for PTCL use only. They are only installed at the end of underground network to serve homes with copper wires in 200-400 feet range. Lastly they submitted that even if PTCL poles were fit to use by them, PTCL being a competitor would not allow them access to the same. No explanation or contradiction has been provided by the Respondent in this regard.

26. Therefore, the relevant product market, in the matter at hand appears to be the aerial passage available to cable and fiber optic service providers through electric poles, as other options are seemingly infeasible both financially as well as practically.

27. Since Respondent is a distribution company, supplying electricity in the area under consideration i.e Peshawar and the greater Khyber Pakhtunkhwa region and rents its electric poles under conditions that maybe distinct from its counter parts operating in other areas of the country, the relevant geographic market is the region of Peshawar.

28. In light of above, the relevant market in the enquiry at hand is the ROW through electric poles availed by different types of cable service providers in the geographic boundary of Peshawar.

29. Before proceeding further into this enquiry, it must be established that the impugned renting policy of Respondent has effects beyond the boundaries of the Khyber Pakhtunkhwa (KPK) region, in light of the decision of the Honorable Lahore high Court, declaring the Act to be a Federal subject.

SPILL OVER EFFECT

30. Pakistan Water and Power Development Authority (WAPDA), was created in 1958 as a Semi-Autonomous Body. Since October 2007, WAPDA has been bifurcated into two distinct entities i.e. WAPDA and Pakistan Electric Power Company (PEPCO). WAPDA is responsible for water and hydropower development whereas PEPCO is vested with the responsibility of thermal power generation, transmission, distribution and billing. PEPCO has been fully empowered and is responsible for the management of all the affairs of corporatized nine Distribution Companies (DISCOs), four Generation Companies (GENCOs) and a National Transmission Dispatch Company (NTDC). These companies are working under independent Board of Directors (Chairman and some Directors are from Private Sectors).

31. About DISCOs, they operate across Pakistan. Following are the distribution companies (DISCOs) operating in Pakistan:

    a. Faisalabad Electric Supply Company (FESCO)
    b. Gujranwala Electric Power Company (GEPCO)
    c. Hyderabad Electric Supply Company (HESCO)
    d. Islamabad Electric Supply Company (IESCO)
    e. Lahore Electric Supply Company (LESCO)
    f. Multan Electric Power Company (MEPCO)
    g. Peshawar Electric Power Company (PESCO)
    h. Quetta Electric Supply Company (QESCO)
    i. Tribal Electric Supply Company (TESCO)

32. PEPCO acts as an umbrella organization to oversee and manage DISCOs operations in specified areas including 'monitoring of revenue and commercial operation'. DISCOs may therefore be influenced by a central body, in this case PEPCO and vice versa in making certain commercial choices. Based on this reality, it cannot be surmised that any DISCO is completely shielded from any influence from the other DISCOs. Due to such links, PESCO's charging of different rate to the combo service providers may serve as a precedent for other DISCOs to follow. Due to the aforementioned structural links, even if subtle, any commercial choice by PESCO may not be looked at as an occurrence peculiar to itself, but something with the

potential to propagate across Pakistan. The likelihood of this may also increase owing to the fact that Combo Services are a nationwide phenomenon not restricted to any province or city.

DOMINANT POSITION

33. Section 2 (1) (e) of the Act defines a dominant position as follows:

> *"**Dominant position** of one undertaking or several undertakings in a relevant market shall be deemed to exist if such undertaking or undertakings have the ability to behave to an appreciable extent independently of competitors, customers, consumers and suppliers and the position of an undertaking shall be presumed to be dominant if its share of the relevant market exceeds forty percent."*

34. As defined above, the definition of dominance comprises a deeming clause and a presumption clause. The deeming clause says, that an undertaking is deemed to have a dominant position, if it has the ability to behave to an appreciable extent independently of its competitors, consumers and suppliers. Alternatively if an undertaking has 40% or more market share, it is presumed to be dominant just by virtue of its market share.

35. In the instant case, electric poles are owned by the Respondent throughout Peshawar and given that no other options are practically feasible, the market of ROW through an aerial passage is wholly and squarely owned by PESCO. In view thereof, the Respondent is presumed to be dominant in the relevant market in terms of Section 2(1)(e) of the Act.

ISSUES

36. After determining the relevant market and addressing the question of dominance, the enquiry committee proceeds to determine ;

*I. **Whether the Respondent has abused its dominant position by:***

*a. **Imposing any unfair trading conditions in prima facie violation of Section 3(3)(a) of the Act?***

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b. ***Implementing different prices for the same product from different customers in the absence of objective justification in prima facie violation of Section 3(3) (b) of the Act?***

c. ***Making conclusion of contracts subject to acceptance of supplementary obligations in prima facie violation of Section 3(3) (d) of the Act?***

d. ***Applying 'dissimilar conditions to equivalent transactions on other parties, placing them at a competitive disadvantage' in prima facie violation of Section 3(3) (e) of the Act?***

e. ***'Refusing to deal' in prima facie violation of Section 3(3) (h) of the Act?***

II. ***Whether the Respondent has indulged in prohibited agreement in contravention of Section 4 of the Act by ;***

a. ***imposing trading conditions, restrictive of competition, on the Complainants in prima facie violation of sub-section a of Section 4(2) read with Section 4(1) of the Act?***

b. ***applying dissimilar conditions to equivalent transactions on the Complainants vis a vis other trading parties so as to place the former at a disadvantage in relation to the latter in prima facie violation of Section 4(2)(f) of the Act?***

c. ***culmination of agreement subject to acceptance of supplementary obligations in prima facie violation of Section 4(2) (g) of the Act?***

ISSUE-I: ABUSE OF DOMINANT POSITION

37. Section 3(1) of the Act states that, *"No person shall abuse dominant position"*. According to Section 3(2) of the Act "*an abuse of dominant position shall be deemed to have been brought about, maintained or continued if it consists of practices which prevent, restrict, or distort competition in the relevant market. Sub section 3 of Section 3 of the Act provides a non-exhaustive list of such practices"*

ANALYSIS

38. As noted above, the Respondent appears to be in a dominant position in the relevant market. To evaluate whether the Respondent has abused its dominant position in prima facie violation of Section 3 of the Act, we shall look at the provisions that the Complainants wish to invoke, in addition to any other that may appear to apply. The proceeding analysis revolves around the following issues, as they appear to be at the heart of the concerns raised in the plaint:
    a. Charging higher fee from fiber optic cable service providers vis a vis coaxial cable service providers;
    b. Additional conditions imposed on fiber optic cable service providers vis a vis coaxial cable service providers;

Issue-I (a): Whether the respondent has imposed any unfair trading conditions in prima facie violation of Section 3(3)(a) of the Act?

39. As explained before, on top of the pole rent, the Respondent has required combo service providers (category within which the Complainants fall) to fulfill certain ancillary conditions if they wish to avail the ROW service. Among those conditions are the following:

Conditions for Complainants
10 minutes free advertising for PESCO
Free internet facility to PESCO with 4mbps minimum bandwidth

40. The essence of Section 3(3)(a) is that an entity that is dominant in the relevant market would be found to have abused its dominant position if among other things it imposes any 'unfair trading conditions'.

41. The term unfair trading condition is also found in article 102(2)(a) of EU competition law and is rather a broad term with some level of vagueness in its application. However there have been cases in Europe where dominant undertakings have been found to be in violation of the article 102 in terms of 'unfair trading conditions' and based on this limited jurisprudence, at least some level of clarity has been achieved in understanding its context. Two of the important cases

in this regard are AAMS[1] and that relating to sale of tickets to French residents in the 1998 Football World Cup[2].

42. Because of the broadness of the term 'unfair trading conditions', it may envelop both types of abuse i.e. exploitative and exclusionary. Even though finding of an exploitative abuse that directly affects 'customers'[3] or 'consumers'[4] has been a subject of debate for decades, as there is a sizeable voice advocating against the idea of treating an exploitative abuse under competition law, decisions have been made by the European Commission and upheld by higher courts that have involved direct/exploitative abuse irrespective of any effect on competition.

43. A practice that is harmful to consumers can be abusive, notwithstanding that it is not harmful to the structure of competition on the relevant market; furthermore it is not necessary to show that the firm that is guilty of abuse derives a commercial advantage from it.[5]

44. The significance of the foregoing discussion is that the application of ancillary conditions is directed at the customers of RoW services directly, and so whether it restricts actual competition in the given market or not, the existing international precedence suggests that the same can be treated under the Act and therefore subject to evaluation as an 'unfair trading condition'.

45. However, that is not to say by any means that any behavior by a dominant undertaking that affects a consumer directly may be looked at as an 'unfair trading condition' from a competition law perspective, as there are factors that may limit the scope of its application based on existing jurisprudence in this regard.

46. Reviewing the relevant case law indicates that there is neither a precise test, nor a complete list of contractual clauses that are considered unfair. As a consequence, there is no exact definition of what is considered as unfair under Article 102(a)TFEU. The fairness has rather

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1 https://www.ipmall.info/sites/default/files/hosted_resources/CompetitionLaw_EuropeanCommunities/24/Abuse%20of%20Dominant%20Position%20(Tobacco)%20The%20AAMS%20Case_24_December_2001.PDF

2 https://ec.europa.eu/commission/presscorner/detail/en/IP_99_541

3 Intermediary undertakings

4 End consumers

5 Competition Law, Eight Edition, Richard Whish & David Bailey

been applied as "an umbrella notion" which is dependent on actual circumstances in particular cases. Accordingly, trading terms are considered to be unfair when they are not absolutely necessary for the attainment of the purpose of the contract and when the terms are disproportionate considering the aim. One-sidedness, control and the ability to impose contract clauses unilaterally may also be among the characteristics capable of imposing unfair contract clauses. In addition, the principle of proportionality is important. The interests of the parties must be balanced and an examination is necessary to see whether there are any other methods capable of protecting those interests. The notions of necessity, proportionality and transparency are thus the benchmarks that are taken into account when evaluating the fairness of contract clauses under Article 102(a) TFEU.[6]

47. When the criteria of necessity, proportionality and transparency as explained above, is applied to the matter at hand, it is sufficiently clear that the Respondent is already charging the Complainants for the relevant service. Thus requiring the Complainants to offer free services in addition to a fee is a unilateral measure on the part of the Respondent that has emanated from its nearly absolute control over the relevant service. It may also be noted that this measure is neither necessary, nor proportional when a fee is already being charged for the service under consideration.

48. Based on the foregoing it appears that the imposition of provision of free services by the Respondent on the Complainants has been an outcome of the leverage it enjoys in the relevant market on account of its dominance, and is neither necessary nor proportional, given that a fee is already being charged in this regard. This behavior of the Respondent therefore seems to amount to imposition of an unfair trading condition and therefore in prima facie violation of clause (a) of Section 3(2) read with Section 3(1) of the Act.

[6] https://www.diva-portal.org/smash/get/diva2:1539881/FULLTEXT01.pdf

Issue-I (b): Whether the Respondent is charging different prices for same goods or services from different customers in the absence of objective justification in prima facie violation of Section 3(3)(b) of the Act?

49. The Respondent, as mentioned earlier, increased it pole rent from Rs. 10/pole/month to Rs. 100/pole/month for optical fiber operators, along with imposition of ancillary conditions, effective from October 21, 2020. The pole rent for cable operators meanwhile remained unchanged at Rs 10/pole/month. Hence, Complainants plead invocation of Section 3(3)(b) of the Act, which states:

> ***Price discrimination by charging different prices for the same goods or services from different customers in the absence of objective justification that may justify different prices***

50. To establish this violation, the emphasis is on two conditions. Firstly whether the product/service in question is the same and if so, whether it's being sold to different customers at different charges without any objective justification for the same. As far as the first condition is concerned, the service in question is passing of data cables through electric poles against a rental amount. This service is primarily being offered by the Respondent.

51. Whether it is the cable operators or AOFC service providers, they require a common aerial pathway (Respondent owned electric poles) to carry out business in Peshawar. With regard to whether the service in question is of a similar nature submissions made by the Complainants and the Respondent were examined.

52. The Complainants are aggrieved that for the above mentioned service, while the Respondent is charging the general cable TV service providers Rs. 10/Pole in a month, they are being charged Rs. 100. It may be noted that the Respondent also requires free ancillary services (such as fast Internet service, advertisements etc.) from the Complainants, that have their own costs.

53. As per Respondent, the discriminatory charges applied on each type of AOFC network operator are based on the following factors:

a. The deployment of AOFC on the Respondent's poles requires additional allocation or reallocation of resources to assess the extent of usage of its facility and to secure its infrastructure (electric meters, cables, and transformer) from damage that may happen in the event of AOFC deployment.

b. AOFC deployment also causes human loss in terms of workers fatalities. To compensate that, the Respondent pays an amount of Rs 4 million on average yearly to the bereaved families (Annexure-ix), and Rs 0.75 million to general public who died due to PESCO's error (Annexure-x).

c. For AOFC deployments, electric feeders have to be shut down at a very heavy expense. The University town Peshawar feeder alone, if switched off for one hour would inflict a loss of Rs 422,500/- on account of unsold units.

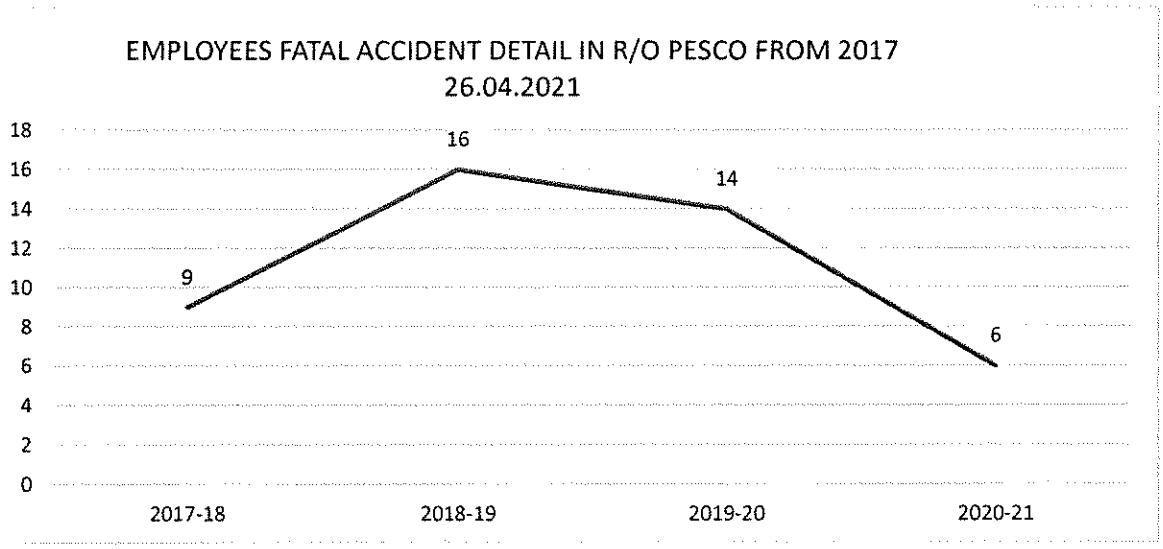
54. In support of its claim, that it incurred 4 million yearly (on average) as compensation to the bereaved families, the Respondent shared its office order dated October, 2020. In the said order it was merely intimated that in pursuance of an office memorandum of Pakistan Electric Power Company (PEPCO), the Respondent's board of directors, in its 147th meeting has approved an increase from Rs. 3.5 million to Rs. 4 million as compensation for the families of the employees who die or become disabled while performing official duties. Since the Respondent has primarily relied on this piece of evidence, there are a couple of points to note here. For one the office order is generalized and involves workers who suffer casualties or disabilities while performing official duties.

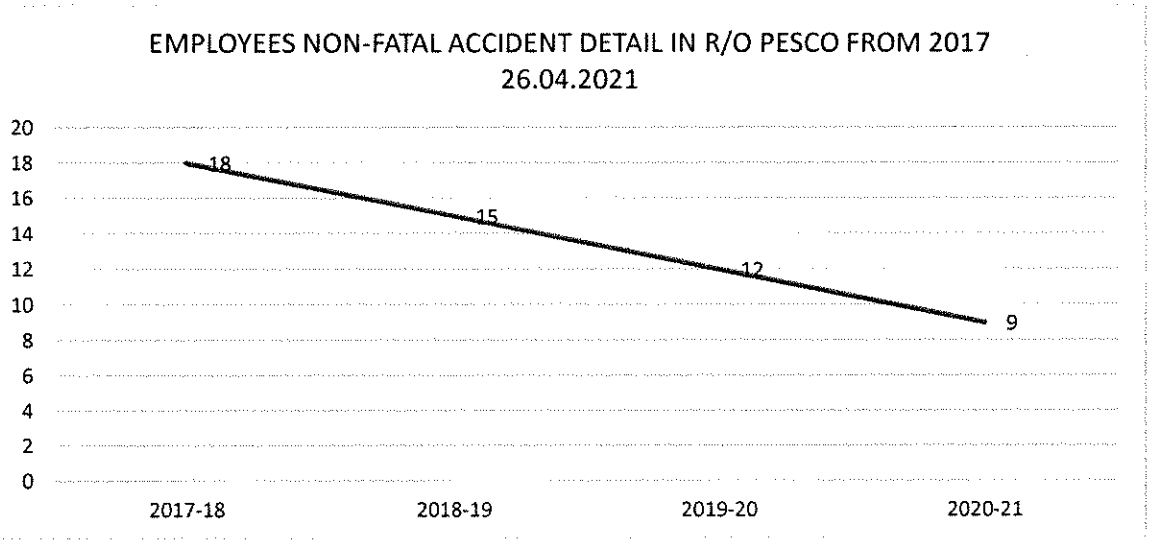
55. The second point is that the office order referred to above clearly states that the approval by the board of directors to increase compensation was in pursuance of PEPCO's office memorandum No. 5967-6016/MDP/GM(HR)/DSW/16 dated 10.7.2020. As stated on its website, one of the defined roles of PEPCO is monitoring and oversight of DISCOs in specified areas including but not limited to 'effective human resource ('HR') control to boost efficiency', thus it is natural to assume that PEPCO's office memorandum was directed at all the DISCOs, and that on job accidents of workers is not peculiar to any one DISCO but a common occurrence across them. The office order of the Respondent merely serves to establish that the fatalities and serious injuries are caused to workers of DISCOs while working on distribution systems, without referring to any specific cause.

56. If fatalities or accident induced disabilities to DISCO workers are primarily caused due to AOFC deployments, and have serious financial and safety implications, it may have been emphasized or at least made a light mention of in the DISCOs' responses to the letters sent by the enquiry team wherein they were asked specifically if they make any distinction between types of data cables in charging them for ROW. As per responses received, no distinction was made by the DISCOs in this regard. The same rent as approved in WAPDA's notification dated Nov 3, 2004 was being charged (responses attached as Annexure-xi) irrespective of cable type. Nowhere was it mentioned, nor any grievance expressed regarding any adverse effects of AOFC deployments on DISCOs and their workers that set them apart from deployment of other types of cables.

57. In fact, GEPCO's response (Annexure-xii) may be of particular interest, wherein, in respect of safety concerns, it categorically stated that safety standards in respect of line clearance and PEMRA and GEPCO specifications are strictly followed and any network creating any hazard or work hindrance is not permitted. As far as charges were concerned GEPCO like other DISCOs did not make any distinction between ROW for different types of communication cables. What this example demonstrates is that a natural remedy to safety hazards is ensuring that the safety protocols are strictly followed irrespective of what type of cable is being deployed.

58. More importantly, associating such incidents with AOFC deployment would rely on the assumption that all or nearly all such accidents are caused by the same. While not a definitive proof, as other factors may also be in play, if there was a stark increase in the number of fatalities and/or disability inducing incidents, post AOFC deployment, the Respondent's argument may have held more weightage. However, contrary to this, statistics provided by the Respondent in the following graphs (Graph-1 below) shows that since the time (2017-18) the Complainants started deploying their AOFC network through its poles till the most recent year (2020-21), the total number of 'non-fatal accidents' has decreased, while the same trend is observed in the number of fatalities after a brief surge going from year 2017-18 to 2018-19.





59. If the AOFC network of the complainants was deployed in 2018 in Peshawar, the number of fatalities or accidents leading to disabilities should have increased as more deployments were made through the years, however we see a completely opposite trend with the least number of fatalities and disability inducing accidents taking place in the most recent year (2020-21).

60. With respect to the monetary loss claimed by the Respondent in the event of switching off of a feeder (Rs. 422,500/- just for shutting down University town Peshawar's feeder) to allow deployment of an AOFC network, the enquiry committee has learned that shutting off of a feeder is carried out based on whether a certain threshold of voltage is crossed, and not the type of cable being deployed. The whole idea is to shut down the pertinent electricity source while workers are deploying cables. This implies regardless of what is being deployed, any worker

would be subject to the same kind of risk, when a certain voltage threshold is crossed. Thus it is a generalized risk and the idea of associating it exclusively with AOFC deployment does not appear to be rational.

61. Based on the facts of the case, it seems that any damage (human or monetary) inflicted on the Respondent cannot be attributed to AOFC deployment alone. It seems to be a generalized issue that may not be attributed exclusively to one type of deployment or the other. Therefore, there does not appear to be any objective justification for charging different pole rent for a service that is seemingly the same.

62. In view thereof, it appears that the Respondent, through its act of applying a dissimilar pole rent on AOFC service providers vis a vis other cable service providers, and extracting or attempting to extract free service from the Complainants, without any substantiated grounds, has essentially indulged in price discrimination, on a service that is apparently same.

63. This behavior of the Respondent, appears to draw leverage from the dominant position it enjoys in the relevant market, and seemingly amounts to abusive conduct in prima facie contravention of Section 3(3)(b) read with Sections 3(2) & (1) of the Act.

Issue-I (c): Whether the Respondent has made the provision of its service (ROW) conditional upon acceptance of supplementary obligations in prima facie violation of Section 3(3)(d) of the Act?

64. The complainant also alleges that the Respondent made conclusion of the contract i.e use of the latter's passage way, subject to acceptance by the complainants of the following supplementary obligations which by their nature or according to commercial usage have no connection with the subject of the contracts, thus in violation of Section 3(3) (d) read with Sections 3(1) & 3(2) of the Act. These conditions are provided in Table-2 below:

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Table-2

Conditions for Complainants	Cable operators (General Cable TV Operators)
Rent of Rs 100/month/pole	Rent of Rs 10/month/pole
Requirement to execute fresh agreement	Not Applicable
Retrospective application of Rs 100 since expiry of the preceding agreement	Not Applicable
2 years contract period, where after Respondent can refuse to extend	Unlimited Term
Security deposit and processing fee, etc required	Not Applicable
10 minutes free advertising for Pesco	Not Applicable
Free internet facility to PESCO with 4mbps minimum bandwidth	Not Applicable
Cable specs being determined by PESCO	Not Applicable
Completion Certificate requirement	Not Applicable
Respondent's unilateral termination right-arbitration is limited only to grant of damages for wrongful termination and not on the question of termination itself	Not Applicable

65. From the above, it is evident, that the Respondent on top of a rental fee of Rs. 100, also requires free facilities such as 4 mbps minimum bandwidth internet and 10 minutes free advertising for PESCO, while such requirements are not imposed on any of its other consumers. Whether such requirements qualify to be supplementary obligations in terms of Section 3(3)(d) of the Act, one must delve into the essence of this provision and what it intends to achieve.

66. In this regard, reference may be made to para 67 of the Order of one member bench of the Commission In the matter of M/S Takaful Pakistan Limited and Travel Agent Association, wherein the honorable Member observed that Imposing supplemental condition is the equivalent of tying arrangement. The order further refers to the following text:

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"There is an "agreement" component in tie-in offense under Sherman Act § 1 and Clayton Act § 3, but one that most tie-ins easily satisfy. The "contract, combination or conspiracy" that triggers § 1 is obviously present when the buyer promises to take its requirements of the second product from a supplier as an express quid pro quo for being allowed to buy the tying product. More generally, the purchase of the second product is inherently an agreement."

67. Tying is specifically mentioned in Article 102(d) TFEU as 'making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts'.[7]

68. Section 3(3)(d) of the Act, which is evidently synonymous with Article 102(d) TFEU, when seen in the correct context, is an exclusionary abuse wherein the dominant undertaking, leveraging its superior market position, imposes supplementary obligations to strengthen or sustain its monopoly position by means of a horizontal or vertical foreclosure. When we look at the requirement by the Respondent to gain free services from the combo service providers as a precondition for availing the latter's service, any such foreclosure is not witnessed.

69. For supplementary obligations to exist in the context of competition law, certain pre-requisites[8] have to be addressed before any inference of prima facie violation on their account can be drawn. These pre-conditions are a natural outcome of the evolutionary process that has shaped the application of the provision dealing with supplementary obligations within the European Jurisdiction. These conditions/criteria are as follows:

1. Does the accused undertaking have a dominant position?
2. Is the dominant undertaking guilty of tying two distinct products?
3. Was the customer coerced to purchase both the tying and tied products?
4. Could the tie be detrimental to competition by foreclosing access to the market?
5. Is there an objective justification for the tie?

[7] https://www.lexisnexis.co.uk/legal/guidance/tying-bundling-the-challenge-of-new-markets-to-article-102-tfeu

[8] Competition Law 8th Edition, Richard Whish & David Bailey

70. Since the above pre-requisites are all inclusive, if any one of them is missing, a violation in respect of 3(3)(d) is rather implausible. When looking at pre-conditions 1 and 2, the criteria seems to be satisfied, but as far as the fulfillment of criteria 3 & 4 is concerned, which also ostensibly have a causal link, the problem at hand quite obviously does not seem to assuage. When the basic nature of a contract is purchasing a good(s) or service(s), but the purchaser is made to fulfil a supplementary condition(s)/obligation(s), having no relation with the subject of the contract, and is essentially imposed to strengthen the monopolist's position by causing a horizontal (common market) or vertical foreclosure (downstream), then such behavior on the part of the latter amounts to an abuse provided conditions 1, 2 & 5 are met simultaneously. Specific to the market of RoW, the Respondent being the only service provider cannot in all likelihood be assumed to be carrying out any foreclosure on a horizontal level. Also with respect to the market of RoW there does not seem to be any downstream function/market and hence without going into any further details, even this notion, in all likelihood, would fail to stand the test of reason. Though the Respondent has no direct interest in the market for provision of internet or advertisement in the commercial sense, even if we were to consider this market for the sake of argument, there is no foreclosure taking place in that either to the detriment of any market players, since all the competitors are equally obligated to fulfil these ancillary conditions. Even if there was any such foreclosure, there may still perhaps be need to evaluate whether the monetary loss incurred by the Complainants has any noticeable bearing on their revenues/income so as to have an appreciable impact on competition in terms of the de-Minimis doctrine.

71. All the foregoing factors considered, the behavior in question does not seem to fulfill the criteria required for finding a prima facie violation of Section 3(3)(d) when read with Sections 3(2) and 3(1) of the Act.

Issue-I (d): Whether Respondent has applied 'dissimilar conditions to equivalent transactions on other parties, placing them at a competitive disadvantage' in prima facie violation of Section 3(3) (e) of the Act?

72. While Section 3(3)(e) of the Act states, that application of dissimilar conditions by a dominant entity, to equivalent transactions, could be an abuse, it also qualifies that it is so when these dissimilar conditions lead to a competitive disadvantage for any of the parties on whom they are applied. Here the point to note is that the competitive disadvantage referred to above is in

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relation to parties that are meted out dissimilar conditions. The pertinent market in this regard is therefore the market where they compete and not the market where they procure services. The parties in question are the coaxial cable operators and fiber optic cable operators.

73. While broadly speaking, each of the medium is a channel for audio visual content, in Pakistan, the general cable TV service as the name suggests has been for the most part centered around provision of broadcast TV service only (through a coaxial cable made of copper), whereas when we think of fiber optic cable, the first thing that comes to mind is high speed broadband technology and associated services.

74. Just to get an idea as to how the fiber optic revolutionized communication technology[9], consider the frequency at which it carries data i.e. two hundred trillion cycles per second. As for bandwidth, for a multimode fiber it is 1GHz/second through a 500 m tether, whereas for lightweight copper cable, even the one optimized for high data rates, can only transmit 500 MHz over only 100 meters or 100 MHz over 500 meters with appropriate modulation[10]. Furthermore, data losses are also very low in non-conducting materials such as fiber optic cable vis copper wires used for traditional cables.

75. Of the Complainants, Cybernet by its own admission, does not offer TV on a standalone basis. It either offers double play service (Internet + TV) or triple play service (Internet + TV + Phone). In other words broadband service offered by Cybernet caters to smart TV applications in addition to the routine live broadcast channels. Owners of smart television can enjoy a myriad of features such as rewind, pause, or re-runs of programs which is not a facility available with analog signals transmitted through coaxial cables. Picture and sound quality is also known to be higher with digital signals along with a much wider array of channels. Netflix, Amazon Prime and all such platforms that have become a rage particularly in the post covid world are applications that can only run on a smart or android TV utilizing digital signals.

76. Thus high speed broadband and services propelled by means of it call for a more sophisticated customer. Any customer who wishes to only watch live television and without any features

[9] https://peakoptical.com/2019/01/fiber-optic-revolutionized-communication/
[10] https://meroli.web.cern.ch/lecture_fibre_vs_copper.html

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offered by a smart TV would be naturally inclined to only obtain a broadcast TV only service for the following reasons:

a. Analog TV service only requires plugging of a cable to a television set
b. Analog TV service offers the traditional range of functions without any add on features
c. There is no requirement of any equipment on the user's end and therefore there are no initial setup costs
d. Monthly charges for routine broadcast channels are much lower

77. Nayatel does offer broadcast television services with no initial set up cost and monthly fee of PKR 400/month. However as explained later, the number of its customers who have subscribed to such service are almost negligible. In contrast while the general cable service providers also offer this service in the same price range, this service is their bread and butter in that except for rare exceptions, all of them exclusively cater to consumers of basic TV services, as there is no option of streaming any content.

78. Other TV only services offered by Nayatel do make use of digital signals, however they do require upfront costs (including equipment cost) for installing equipment at the users' end. In Nayatel's case the equipment used is called a digital box and the benefit it offers is a wider array of channels compared with basic channels, along with better quality and higher definition (digital and HD channels). This digital box comes with a one-time fee of PKR 5500 or monthly installments of PKR 500 for roughly a year. For 1st digital box, the monthly charges are PKR 300 additional (on basic TV) and from every subscription of digital box from there onwards the monthly charges are PKR 150 on top. There is one more service that gives a user access to Nayatel's own version of Video on Demand and very much like above it has initial setup and cost of equipment along with enhanced monthly charges. Services utilizing digital signals having their on unique characteristics may further be considered sub-markets within the TV only service segment.

79. Nayatel has submitted that as of August, 01, 2021, its total subscriber's base was 3,705 of which only 39 customers were subscribers for cable TV without internet, which includes digital applications such as provider's self-offered VoD. Without going into the debate whether within

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the segment of TV only service, there may be further sub-markets[11], the number of broadcast TV subscribers being a subset of the above, would naturally be even less. This translates to less than 0.01% of Nayatel's subscriber base. Anything this insignificantly small cannot be a marker of any notable market presence, when the market in question is that of broadcast TV only.

80. For popular subscription based streaming services such as Netflix and Prime TV, it is required to have high speed internet. In this age of laptops, tablets, android phones, high speed internet is also required for running applications on these devices. It may not be an exaggeration to say that these devices have somewhat become sort of substitutes for television, to some extent at least, for a discrete set of consumers.

81. To sum up the foregoing, in Pakistan the audio visual data transmitted through coaxial cables has been primarily geared toward the live broadcast of television channels. Fiber optic service on the other hand is geared towards internet and all related applications. It is because data travel through fiber optic cables at lightning speed. All the modern applications based off of high speed internet are suited to the fiber optic technology.

82. For regular cable service, a cable is connected directly to a television set. No set up mechanism or equipment is required at the user's end. A TV only service typically costs in the 400 – 450 Rs range/month. With the fiber optic cable, TV is primarily an ancillary service to the high speed broadband internet. The package vary based on the internet speed opted by a consumer. For internet packages or triple play service i.e. internet, cable TV and phone, the monthly charges can range anywhere from roughly Rs 1600 to Rs. 10,200 depending on the speed of internet (ranges from 10 Mbps to 100 Mbps). If tax included, this amounts to roughly Rs. 2000, which is five times or 400% more expensive than a standalone TV service. This is not including the one time or initial setup cost. If we factor that in, it ranges from roughly Rs. 13000 to Rs. 23,000 again depending on the internet speed. Based on the factors, discussed thus far, the fiber optic and coaxial cable services do not seem to be each other's substitutes, in fact it is quite

[11] However some service providers have their own database of programs/documentaries, available as video on demand. To access this there may not be need for an internet connection as a digital device could be installed at the user's end for carrying out streaming. Take for example the case of one of the Complainants i.e. Nayatel. Nayatel offers subscribers of its TV service, access to its own VOD library. Users who do not want a subscription based VOD (SVOD) thus need not have an internet service and may enjoy digital features such as pause, play, rewind and re-runs of routine broadcast channels along with a library of videos/documentaries by simply purchasing a piece of equipment called the joy box from Nayatel.

apparent that they target different market segments, each representing a disparate set of socioeconomic class for the most part.

83. In view of the foregoing it cannot be surmised that the dissimilar conditions imposed on the two types of cable services, which as it appears have distinct characteristics and target audience, create a competitive advantage or disadvantage for any of them as they operate in seemingly different markets. This in perspective, the enquiry committee has been unable to find any prima facie contravention of Section 3(3) (e) of the Act.

Issue-I (e): Whether the Respondent is refusing to share an essential facility in prima facie violation of Section 3(3) (h) of the Act?

84. In addition to the foregoing, the Complainants also desire invocation of Section 3(3) (h) read with Sections 3(1) & (2) of the Act, which is 'refusal to deal'. As per Complainants, charging higher for pole rent essentially tantamount to 'refusal to deal' as envisaged in the aforementioned provision of the Act. In Competition Law whether practiced locally or internationally, there are two types of 'refusal to deal' – horizontal and vertical. Whether its competitors or vertically linked market players, the refusal to deal by a dominant entity essentially means the refusal to share an essential input or facility by the same, so as to put the intended parties at a competitive disadvantage in relation to itself.

85. In any instance of 'refusal to deal' the very first step is to determine whether the facility in question is essential to begin with. In the matter at hand, without going into the intricacies of determining whether electric poles offering a pathway for data cables to provide services, are an essential facility in terms of the Act, the enquiry committee simply assumes it is.

86. We now refer to International Comparative Legal Guides, an online open source storehouse[12] for current and practical comparative legal information in various practice areas including competition law. This Power house of legal information has contributions from experts in

[12] https://iclg.com/practice-areas/vertical-agreements-and-dominant-firms-laws-and-regulations/european-union

various fields of law. Emmelie Wijckmans[13] and Frank Wijckmans[14] are two such experts with extensive experience and research in E.U competition law. In a monograph published by them on 'Vertical Agreements and Dominant Firms Laws and Regulations' they have briefly touched upon the circumstances in which 'refusals to deal' are considered anti-competitive. They aver that a refusal to supply can constitute an abuse if a number of conditions are fulfilled including;

a. The Undertaking refusing to supply is vertically integrated and dominant in the upstream market;
b. The product to which access is refused is indispensable for competing in the downstream market;
c. The refusal leads to elimination of effective competition in the downstream market; and lastly ;
d. an objective justification is lacking.

87. In the matter at hand, the Respondent has ostensibly been found to be dominant as per reasoning provided in paras **33-35**. However, neither it is vertically integrated, nor could it be surmised that the very service of offering electric poles for the passage of data cables constitutes the upstream market to the market of provision of high speed broadband services. Based on non-fulfillment of this condition alone, no further analysis may be required to evaluate a potential vertical refusal to supply.

88. The above stated bench mark more or less finds resonance in the U.S jurisprudence. Herbert J. Hovenkamp, a faculty member at the Carey Law School at University of Pennsylvania, in his article titled 'Unilateral Refusals to Deal, Vertical Integration[15], and the Essential Facility Doctrine' asserts that the vertical refusal to deal is essentially the refusal to share an essential facility by a vertically integrated monopoly. The vertically integrated monopolist may be present in a market from where an essential input or facility is needed for an upstream or downstream market.

[13] has a broad experience in competition law matters particularly related to Belgian Competition Authority and the European Commission. Frank Wijckmans is a partner at contrast.
[14] Frank is a professor at the Brussels School of Competition where he teaches ' the law of Economics of vertical restraints. Frank has served as an expert advisor to the DG competition of the European Commission and an extensive record of publications on EU Competition law to his name.
[15] Vertical integration is a strategy that allows a company to streamline its operations by taking direct ownership of various stages of its production process rather than relying on external contractors or suppliers.

89. The United States Federal Trade Commission on its official website, under the link 'Guide to Antitrust Laws' makes the following statement about refusal to deal:

> *In general, any business — even a monopolist — may choose its business partners. However, under certain circumstances, there may be limits on this freedom for a firm with market power. As courts attempt to define those limited situations when a firm with market power may violate antitrust law by refusing to do business with other firms, the focus is on how the refusal to deal helps the monopolist maintain its monopoly, or allows the monopolist to use its monopoly in one market to attempt to monopolize another market.*

90. While the foregoing does not outright rule out 'refusal to deal' in case a dominant firm refusing to do business with other firms is not vertically integrated, it does emphasize that the evaluation of the same may hinge upon how the former leverages that refusal to maintain its existing monopoly or use its existing market power to gain monopoly in another market. Quite clearly, this seems to imply the very purpose of 'refusal to deal' by a dominant firm is to cement its monopoly at the expense and to the disadvantage of its existing or potential competitors.

91. The leading U.S. essential facilities case is MCI Communications Corp. v. AT&T. (708 F.2d 1081, 1132 (7th Cir.), cert. denied, 464 U.S. 891 (1983)) The Seventh Circuit said that there were four elements necessary to establish liability under the essential facilities doctrine:

    a. Control of the essential facility by a monopolist;
    b. A competitor's inability practically or reasonably to duplicate the essential facility;
    c. The denial of the use of the facility to a competitor;
    d. The feasibility of providing the facility.[16]

92. The aforementioned conditions quite clearly seem to imply that the target of refusal must be a competitor to the monopolist in a common market whether 'upstream' or 'downstream'. In the matter at hand, the Complainants (i.e. Nayatel and Cybernet), who wish to invoke a violation in terms of 'refusal to deal' do not compete with the Respondent in any market. Without getting

[16] https://www.oecd.org/daf/competition/abuse/1920021.pdf

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into whether the charging of PKR 100/pole/month by Respondent may amount to a 'constructive refusal'[17] (unlike 'outright refusal') to deal, the very fact that the Respondent and the Complainants do not operate in any common market, seem to suffice in ruling out an occurrence of 'refusal to deal' in the way it may be interpreted.

93. The behavior of the Respondent to charge a higher fee than before, therefore does not seem to attract an invocation or violation of Section 3(3)(h) read with Sections 3(1) & (2) of the Act.

94. Next, the enquiry committee proceeds to determine whether the Respondent has seemingly entered an agreement in violation of Section 4 of the Act?

Issue-II: Whether by means of an Agreement the Respondent has imposed trading conditions, restrictive of competition, in prima facie violation of sub-sections a of Section 4(2) read with Section 4(1) of the Act?

95. Section 4 of the Act pertains to prohibition of agreements that by object or effect appear to prevent, restrict, or reduce competition within the relevant market, and that have not been exempted under Section 5 of the Act. The provisions that the Complainants wish to invoke are Sections 4(2) (a), (f) and (g) of the Act.

96. The basic contention which is the revision of pole rent from Rs 10/pole/month to Rs 100/pole/month has come about in the form of an agreement between the Respondent and the Complainants. One of the Complainants (Nayatel) has signed this contract under protest, whereas the other (Cybernet) has neither signed nor complied with this arrangement imposed on it. The latter is therefore equally aggrieved, hence their joint complaint. In the second case the agreement has not been signed, but to see whether or not it qualifies to be an agreement we refer to the definition of an agreement as provided for in the Act. It says:

> *'agreement' includes any arrangement, understanding or practice, whether or not it is in writing or intended to be legally enforceable;*

[17] characterized by the dominant firm's offering to supply its rival on unreasonable terms, such as extremely high prices, degraded service, or reduced technical interoperability. (source: UCWG RTD Report - https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/07/UCWG_SR_ReftoDeal.pdf)

97. Whether or not Cybernet has signed any document, this understanding is very much there that Cybernet is obligated to pay Rs 100/pole rent if it is to utilize the RoW service from the Respondent. Sooner or later, Cybernet is aware that it will be liable to conform to it, which is evident from the fact that it has filed the plaint at hand. Under Pakistan law, a contract is a binding legal agreement reached between two or more parties. Generally speaking, a contract will be formed when an offer to enter into binding legal relations is accepted by another party accompanied by the exchange of valuable consideration. The words 'arrangement' and 'understanding' describe something less than a contract. While there is no precise definition of the words arrangement or understanding, they are taken to imply a meeting of two or more minds. In particular, they ordinarily require communication between the parties, with consensus as to what is to be done, rather than a mere hope or expectation as to what might be done or will happen. Moreover, the definition of 'agreement' in the Competition Act is not only restricted to arrangement or understanding and includes 'practice'.[18] If we go by the above understanding of an arrangement or understanding, a consensus seems to be a necessary condition for an agreement as against a hope or expectation as to what might happen. Going by this definition a contract has already been signed between Nayatel and the Respondent, thus it amounts to an agreement. As for Cybernet's case, the contract doesn't exist in the absence of its signature. Furthermore there is no consensus on the terms of the arrangement. This being the case it cannot be inferred that there exists an agreement between Cybernet and the Respondent. Thus any evaluation of a prohibited agreement in terms of Section 4 of the Act may be limited to Nayatel.

98. The grievance is with respect to the agreement that has not been signed, even though the Respondent has been unable to collect the Rs 100 pole rent to date, the agreement is still in force. Nayatel argues that imposition of terms by the Respondent such as Rs 100/pole/month rent and the requirements to offer free services are restrictive of competition by placing the former at a disadvantage vis its competition. However to test the validity of this argument, it needs to be resolved first and foremost, who the Complainants' competitors are. This has already been explained in detail in paras (72-83) above. Operators of regular cable do not compete with providers of high speed broadband service and its related applications. As per Nayatel's own admission, out of its 3,705 customers in Peshawar, only 39 have subscribed for

[18] https://www.riaabarkergillette.com/pk/wp-content/uploads/2016/07/Competition-Law-in-the-Asia-Pacific-2014.pdf

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a TV only service. This is a mere 0.01% of its total customer base. Considering further segmentation within the TV only service, the number would be even less than that.

99. As far as Complainants' own competitors are concerned such as the providers of triple play services, these conditions apply uniformly to them all, leaving out the question of any advantage or disadvantage afforded to some over others.

100. If the matter is even looked at from the view point of any barriers to market entry or expansion, it may be noteworthy that even after the increase in pole rent to Rs. 100/pole/month, for Nayatel it is merely 5% of the operating cost, up from 0.5% in the city of Peshawar (Annexure-xiii). This implies that the impact of increase in pole rent would have a minimal or insignificant impact either on the service provider or the consumer of this service, if and when such an impact is passed on the latter, especially considering its socio economic status.

101. In view of the above considerations, the new rates for pole rent do not appear to stifle competition to an appreciable extent and hence do not appear to equate to a restrictive trading condition in terms of Section 4(2) (a) read with Sections 4(1) and 4(2) of the Act.

102. In evaluating whether the Respondent by means of an Agreement has infringed Sections 4 (2) (f)[19] and (g)[20] read with Section (4) (1) of the Act, we may not need to look any farther than the evaluation of Sections 3 (3) (d) and (e) as provided in paras (64-71) and (72-83) respectively. This is so because the latter seem to bear the same essence as their corresponding provisions in Section 4 of the Act. The only plausible reason for reproducing the same simultaneously in Section 4, appears to be, that while in the former the condition of dominance must be satisfied, an existence of an agreement suffices in the latter. Since the Respondent was not found to have abused its dominant position in terms of Section 3 (1) (d) and (e), it does not seem to invite a different outcome when applied in the context of Section 4 of the Act.

[19] Applying dissimilar conditions to equivalent transactions on the complainants vis a vis other trading parties so as to place the former at a disadvantage in prima facie violation of Section 4(2)(f) of the Act

[20] Culmination of agreement subject to acceptance of supplementary obligations in prima facie violation of Section 4(2) (g) of the Act?

CONCLUSION

The Relevant Market:

103. Based on paras (19-28), the relevant market in the enquiry at hand is the ROW through electric poles availed by different types of cable service providers in the geographic boundary of Peshawar and its precincts.

Spill Over Effect:

104. Based on paras (29-32), there is a likelihood that the other DISCOs could adopt the Respondent's policy in applying rates on combo service providers, due to structural links between the former. In the same vein this effect could propagate nationwide as most combo service providers have nationwide presence.

Dominance:

105. Paras (33-35) serve to establish that evidently, the Respondent holds a 100 % share in the Relevant Market. In view thereof, the Respondent is presumed to be dominant in the same in terms of Section 2(1)(e) of the Act.

Imposition of Ancillary Conditions- Unfair trading condition:

106. Based on Paras 39-48, the Respondent by imposing ancillary condition on top of charging a rent for use of the relevant service, has done so unilaterally as a result of its seemingly absolute control over the facility. The said imposition being unrelated to the nature of the contract, was neither necessary nor proportional in terms of securing the Respondent's commercial interest and is therefore ostensibly an unfair trading condition in terms of Clause (a) of subsection (3) when read with Sections 3(2) and 3(1) of the Act

Discriminatory Pricing – Exploitative Abuse:

107. On the basis of paras (49-63), the Respondent has discriminated between the combo triple service providers and cable providers by charging the former a different rent for a common transaction i.e. right to passage through its owned facility. The Respondent has provided various reasons for carrying out such price discrimination, however it has been unable to substantiate the same. In the absence of such objective justification, the said behavior of the

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Respondent appears to be in prima facie contravention of Section 3(3)(b) read with Sections 3(2) & (1) of the Act.

Supplementary Obligation / Classic Tie-In – Exclusionary Abuse:

108. Based on Paras (64-71) the condition imposed by the Respondent on fiber optic cable service providers to offer it services such as fast speed internet, and advertisement time, free of charge, do not fulfill the basic conditions necessary in leading to a prima violation of Section 3(3)(d) read with Sections 3(2) and 3(1) of the Act.

Dissimilar Conditions Leading to Competitive Disadvantage – Exclusionary Abuse:

109. Para (72-83) explain in detail as to how the behavior of the Respondent does not ostensibly violate Section 3(3) (e) read with Sections 3(2) & (1) of the Act.

Refusal to Deal – Exclusionary Abuse:

110. Based on Paras (84-93), the very action of the Respondent to increase the rental charges for the relevant product, does not appear to be a case of constructive refusal to share an essential facility, and hence does not seem to fall under a violation of Section 3(3)(h) read with Sections 3(1) & (2) of the Act.

Prohibited Agreements Under Section 4:

111. Based on paras (95-101), there does not appear to be a prima facie contravention of Section 4(2) (a) of the Act.

112. Based on para (102) the conditions imposed upon the Complainants by means of an agreement, do not appear to be in prima facie contravention of Sections 4(2)(f) and (g) when read Section 4(1) of the Act.

Summation:

113. To sum up the above, while the Respondent appears to have steered clear of violations under Sections 3(3)(d), 3(3)(e), 3(3)(h), 4(2)(a), 4(2)(f), 4(2)(g) of the Act as alleged, it seems to have contravened Sections 3(3)(a) and 3(3)(b) each read with Sections 3(2) & (1) of the Act.

RECOMMENDATION

114. In light of the above stated findings, the enquiry committee suggests that the Commission may consider initiating proceedings against the Respondent under Section 30 of the Act for engaging in behavior that appears to be in contravention of Sections 3(3)(a) and 3(3)(b) each read with Sections 3(2) & (1) of the Act.

Muhammad Shamaoun	Muhammad Qasim Khan	Furqan Khan Khattak
Enquiry Officer	Enquiry Officer	Enquiry Officer